IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re EXODUS COMMUNICATIONS, INC. SECURITIES LITIGATION

This Document Relates to: ALL ACTIONS
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Master File No. C-01-2661 MMC

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS ASSERTED BY PLAINTIFF THOMAS WELCH; VACATING HEARING

(Docket No. 289)

Before the Court is defendant Ellen Hancock's ("Hancock") motion, filed March 30, 2006, for summary judgment against plaintiff Thomas Welch ("Welch"), on the ground Welch lacks standing to assert a claim under § 11 of the Securities Act of 1933. Defendants Goldman, Sachs & Co., Merrill Lynch & Co., Morgan Stanley Dean Witter, and J.P. Morgan (collectively, "Underwriter Defendants") have filed a joinder in the motion. Welch has filed a "response" to the motion, to which Hancock has filed a reply. Having reviewed the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision without oral argument, see Civil L.R. 7-1(b), VACATES the June 9, 2006 hearing, and rules as follows.

BACKGROUND

In the Corrected Third Amended Consolidated Class Action Complaint ("CTAC"), filed April 29, 2005, lead plaintiffs Michael Klein ("Klein"), Teresi Trucking, Inc. ("Teresi"),

and William Friedman ("Friedman"), as well as additional named plaintiffs Martin Fox ("Fox") and Welch assert claims for alleged violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and §§ 11 and 15 of the Securities Act of 1933. (See CTAC ¶¶ 343-365.) In an order filed August 5, 2005, the Court dismissed with prejudice all claims with the sole exception of the § 11 claim as asserted against the Underwriter Defendants. (See Order Granting in Part and Denying in Part Underwriter Defendants' Motion to Dismiss; Granting Individual Defendants' Motion to Dismiss, filed August 5, 2005, at 72.) In an order filed September 12, 2005, the Court granted plaintiffs' motion for reconsideration of the dismissal of the § 11 and § 15 claims as asserted against Hancock. (See Order Granting Plaintiffs' Motion for Reconsideration, filed September 12, 2005, at 4.) Thus, the remaining claims in the instant action are the § 11 claim, as asserted against the Underwriter Defendants and Hancock, and the § 15 claim, as asserted against Hancock.

On April 28, 2006, the Court dismissed the § 11 and § 15 claims asserted by lead plaintiffs Klein, Teresi and Friedman, based on their express statements that they were not asserting claims for violations of § 11 and had no other active claims. (See Order Granting in Part and Denying in Part Motion for Involuntary Dismissal, filed April 28, 2006.) On May 9, 2006, the Court dismissed all claims asserted by Fox, for failure to prosecute. (See Order Dismissing Named Plaintiff Martin Fox, filed May 9, 2006.) Consequently, Welch is the sole remaining named plaintiff.[1]

With respect to the § 11 claim, Welch alleges the registration statements and prospectuses issued in connection with the February 6, 2001 stock and note offerings by Exodus Communications, Inc. ("Exodus") "contained untrue statements of material fact or omitted to state material facts required to be stated therein or necessary to make the statements therein not misleading." (See CTAC ¶¶ 343-355.) Welch alleges he purchased Exodus shares that are "traceable to Exodus's February 6, 2001 secondary offering of common stock." (See id. ¶ 25.)

[1] Two motions to intervene as named plaintiffs are before the Court, and will be addressed in separate orders.

LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment as to "all or any part" of a claim "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(b), (c). Material facts are those that may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. See id. The Court may not weigh the evidence. See id. at 255. Rather, the nonmoving party's evidence must be believed and "all justifiable inferences must be drawn in [the nonmovant's] favor." See United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc) (citing Liberty Lobby, 477 U.S. at 255).

The moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatory answers, admissions and affidavits, if any, that it contends demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party's burden is discharged when it shows the court there is an absence of evidence to support the nonmoving party's case. See id. at 325.

A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." See Fed. R. Civ. P. 56(e); see also Liberty Lobby, 477 U.S. at 250. The opposing party need not show the issue will be resolved conclusively in its favor. See Liberty Lobby, 477 U.S. at 248-49. All that is necessary is submission of sufficient evidence to create a material factual dispute, thereby requiring a jury or judge to resolve the parties' differing versions at trial. See id.

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DISCUSSION

Section 11 provides, in relevant part, that if "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may . . . sue[.]" See 15 U.S.C. § 77k(a). To have standing to assert a claim that a registration statement violates § 11, the plaintiff must show that he "purchased a security under that, rather than some other, registration statement." See Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 (9th Cir. 1999); see also Krim v. pcOrder.com, Inc., 402 F.3d 489, 500 (5th Cir. 2005) ("Congress conferred standing on those who actually purchased the tainted stock, not on the whole class of those who possibly purchased tainted shares[.]") (emphases in original). "If there is a mixture of pre-registration stock and stock sold under the misleading registration statement, a plaintiff must either show that he purchased his stock in the initial offering or trace his later-purchased stock back to the initial offering." See Hertzberg, 191 F.3d at 1080 n.4.[2]

In Welch's certification pursuant to 15 U.S.C. § 78u-4(a)(2), dated August 23, 2001, Welch attests that he purchased 300 shares of Exodus stock on February 6, 2001, at $19.065 per share, and thereafter, on April 18, 2001, purchased an additional 200 shares at $10.44 per share. (See Harting Decl. Ex. A.) Welch further confirmed such purchases in his responses to Hancock's First Set of Interrogatories, dated March 8, 2006. (See Harting Decl. Ex. B at 6-7 (Response to Interrogatory No. 1).)

Hancock's expert on tracing, Anil Shivdasani, Ph.D. ("Dr. Shivdasani"), attests that because Welch purchased Exodus shares on February 6, 2001 at a price higher than the February 6, 2001 offering price of $18.50 per share, Welch did not purchase his shares in

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[2] Welch's § 15 claim is derivative of his § 11 claim; if he lacks standing to assert a § 11 claim, he likewise lacks standing to assert his § 15 claim. See, e.g., In re Daou Systems, Inc. Securities Litigation, 411 F.3d 1006, 1029 (9th Cir. 2005) ("Section 15(a) of the 1933 Securities Act imposes joint and several liability upon every person who controls any person liable under sections 11 or 12."); Falkowski v. Imtation Corp., 309 F.3d 1123, 1132 n.2 (9th Cir. 2002) (noting § 15 does not set forth "separate grounds for liability").

that offering. (See Shivdasani Decl. ¶ 7.) Dr. Shivdasani further attests that there were more than 550 million Exodus shares outstanding immediately after the February 6, 2001 offering, only 13 million of which shares were issued in the February 6, 2001 offering. (See id. ¶ 8.) According to Dr. Shivdasani, it is not customary to keep track of the origin of shares issued in a "secondary market transaction," such as the February 6, 2001 offering, "because shares of the same class have the same cash flow and governance rights, making them virtually indistinguishable from each other." (See id.) Consequently, Dr. Shivdasani opines, "it is not possible to trace the shares purchased by Mr. Welch to the equity offering on February 6, 2001." (See id.)

On April 28, 2006, the Court granted Welch's motion, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, to continue the hearing on the motion for summary judgment to June 9, 2006 to afford Welch the opportunity to complete pending discovery. In his current response, filed May 19, 2006, however, Welch sets forth no evidence or argument that his shares are traceable to the February 6, 2001 offering. Rather, Welch argues that the Court should continue the hearing on the motion for summary judgment until some unspecified time after the Court rules on the pending motion by Ellen Brodsky ("Brodsky") to intervene as plaintiff, in order to "conserve the resources of the Court and the parties." (See Response at 4.) The issue of whether Brodsky may intervene in the instant action, however, has no relationship to the issue of whether Welch has standing to sue.

Welch also requests a further Rule 56(f) continuance, on the ground that certain discovery identified in Welch's previous Rule 56(f) submission remains incomplete. In particular, Welch states in his response, without citation to a declaration, that, on April 26, 2006, he provided "financial information, requested by the Underwriter Defendants to conduct additional searches" for unspecified documents and information that might identify him as a purchaser of Exodus securities in the February 6, 2001 offering or trace his stock purchases to that offering. Welch further states he "has received no response concerning

the results of the supplemental searches conducted with that information."[3] (See Response at 3-4.) Welch fails to identify, however, the documents and information he expects to obtain from the Underwriter Defendants, and fails to explain how such documentation will preclude summary judgment. A party seeking a Rule 56(f) continuance "must show how additional discovery would preclude summary judgment." See Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 524 (9th Cir. 1989). In particular, the party seeking a continuance must specifically identify relevant existing information that he needs, and make clear how that information would allow such party to successfully oppose the motion. See id.; see also Wellman v. Writers Guild of Am., West, Inc., 146 F.3d 666, 674 (9th Cir. 1998) (holding district court did not err by denying Rule 56(f) motion where it determined that desired evidence was unnecessary to plaintiff's case and plaintiff did not explain how information he sought would preclude summary judgment). "The mere hope that further evidence may develop prior to trial is an insufficient basis for a continuance under Fed. R. Civ. P. 56(f)." Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council, 817 F.2d 1391, 1395 (9th Cir. 1987). Because Welch has failed to identify specific information in the possession of the Underwriter Defendants that he needs and that would preclude summary judgment, Welch has not set forth good cause for a further Rule 56(f) continuance.[4]

In sum, the evidence is undisputed that Welch did not purchase Exodus shares in the February 6, 2001 offering, and Welch has submitted no evidence tracing his shares to that offering.

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[3] Welch's previous Rule 56(f) motion was based, in part, on his assertion that he had not received a response to the subpoena he served on his broker, Ameritrade, seeking all documents relating to his transactions in Exodus securities. In Welch's current response, he does not contend such discovery remains outstanding.

[4] The Court further notes that in connection with defendants' reply, counsel for the Underwriter Defendants attests that the Underwriter Defendants have conducted the supplemental searches requested by Welch and "found no documents or other information relating to whether Mr. Welch purchased Exodus common stock in Exodus' February 2001 secondary offering or traceable to that offering." (See Collins Decl. ¶ 4.)

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment in favor of defendants and against Welch is hereby GRANTED, on the ground Welch lacks standing to assert a claim under § 11.

This order terminates Docket No. 289.

IT IS SO ORDERED.

Dated: June 2, 2006

MAXINE M. CHESNEY
United States District Judge